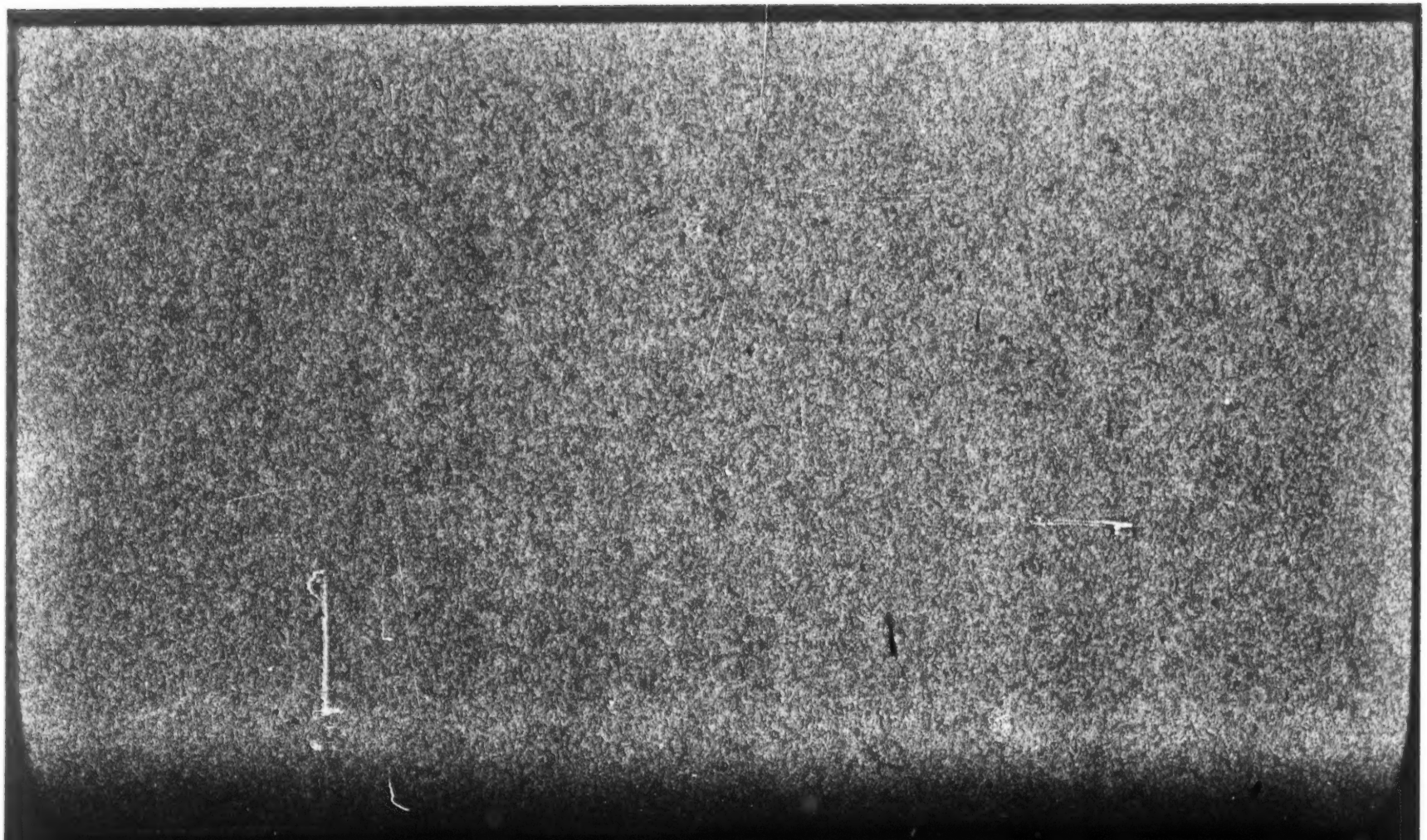


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No. 36

In the Supreme Court of the United States

OCTOBER TERM, 1930

R. E. GRAHAM AND E. E. FOSTER, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF MILLIE FRANCIS OIL COMPANY, A COPARTNERSHIP, PETITIONERS

v.

REX B. GOODCELL, FORMER COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES OF AMERICA IN AND FOR THE SIXTH COLLECTION DISTRICT, STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 36

R. E. GRAHAM AND E. E. FOSTER, COPARTNERS, Doing Business Under the Firm Name of Millie Francis Oil Company, a Copartnership, petitioners

v.

REX B. GOODCELL, FORMER COLLECTOR OF INTERNAL REVENUE of the United States of America in and for the Sixth Collection District, State of California

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The judgment of the United States District Court for the Southern District of California (R. 17) was entered without opinion other than brief conclusions of law (R. 16). The opinion of the United States Circuit Court of Appeals for the Ninth Circuit (R. 31) is reported in 35 F. (2d) 586.

JURISDICTION

The decree of the Circuit Court of Appeals was entered November 4, 1929. (R. 35.) Petition for certiorari was filed January 20, 1930. Certiorari was granted March 3, 1930 (R. 39), 281 U. S. 708. Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where a tax is assessed within time and prior to June 2, 1924 (the effective date of the Revenue Act of 1924), but a claim in abatement is filed and collection is deferred until after the statutory time therefor has expired, does Section 611 of the Revenue Act of 1928 bar recovery of the tax so paid?

This is the broad general question involved herein and in thirteen cases which are to be argued immediately following this case. If the broad general question should be answered in the affirmative, then in this particular case the questions arise whether the fact that this is a suit against a Collector of Internal Revenue, or the fact that there was a period after rejection of the claim in abatement and before the statute of limitation against collection had run within which collection might be made, or the fact that suit was entered before the enactment of Section 611 of the Revenue Act of 1928, leads to a different result.

STATUTES INVOLVED

The statutes involved will be found in Appendix A of this brief, pp. 38–44, *infra*.

STATEMENT

The petitioners brought this suit to recover certain amounts paid to the respondent consisting of additional excess-profits taxes for the year 1917 in the amount of $7,034.71 and interest thereon in the amount of $2,004.69. (R. 5.) The case was tried in the District Court upon a stipulation of facts. (R. 11–14.)

The petitioners, engaged in business as copartners under the firm name of Millie-Francis Oil Company, filed their partnership income and partnership excess-profits tax returns for the year 1917 on March 22, 1918, and paid the taxes due thereunder. (R. 11.) An assessment of additional taxes for 1917 against the petitioners was made by the Commissioner of Internal Revenue on the January, 1920, list. (R. 12.) The petitioners filed a claim for abatement of this assessment on February 11, 1920, and the claim was rejected by the Commissioner on December 27, 1922. (R. 12.) The five-year period for collection of the 1917 taxes of the petitioners expired March 22, 1923. The respondent on November 19, 1924, served a notice and demand on the petitioners for the payment of the additional tax with interest and threatened to enforce such payment by distraint and sale. (R. 12.) The petitioners paid the additional tax and interest

under protest in two installments on November 29, 1924, and December 3, 1924. (R. 12.) Thereafter, on September 25, 1925, they filed a claim for refund of the whole of the amount paid on the ground that it was collected after the statute of limitations against collection had run. This claim was rejected by the Commissioner of Internal Revenue on January 13, 1926. (R. 12–13.) The Revenue Act of 1926 was enacted February 26, 1926. Petitioners entered suit herein on December 23, 1927. (R. 8.) The Revenue Act of 1928 was enacted May 29, 1928.

No waiver extending time for assessment or collection under Section 250 (d) of the Revenue Act of 1921 is involved. (R. 13.)

The validity of the assessment is not questioned. The trial court found "that if the taxes were collectible, the proper amount of tax was assessed and paid." (R. 16.)

The petitioners were given judgment by the trial court. (R. 17.) This judgment was reversed by the Circuit Court of Appeals. (R. 35.)

SUMMARY OF ARGUMENT

At the time the taxes herein involved were collected such collection was barred by the statute of limitations. At the time this suit was entered (which was prior to the enactment of the Revenue Act of 1928) the respondent was without a defense, unless Section 1106 (a) of the Revenue Act of 1926 constituted a defense. It is the respondent's position that Section 611 of the Revenue Act of

1928, enacted before entry of judgment in the District Court, constituted a defense to the action, and that the judgment of the Circuit Court of Appeals in favor of the respondent should be affirmed.

The facts of the instant case bring it within the provisions of Section 611. The legislative history of the section and the reasons for its enactment show that it was intended to prevent recovery of amounts collected after the running of the statute of limitations where the assessment was timely, a claim in abatement asking for further consideration filed, and the collection stayed. The word "stayed" as used in the section does not contemplate a mandatory or judicial stay as a result of which collection was prohibited. To give the word such meaning would be to deprive the section of any substantial effect and would be contrary to the purpose underlying its enactment. The word "stayed" refers to the delay in collection which results from the consideration of the claim in abatement. The fact that there still remained some time to collect after rejection of the claim in abatement does not affect the applicability of the section as a defense.

Section 611 is not merely a rule for the administrative guidance of the Commissioner. If this were its sole purpose a situation would result where as a prerequisite to the right to sue an application must be made to the Commissioner for a refund which he could not grant. Moreover, it would

defeat the purpose of the enactment, which was to permit the retention of the amounts collected. The provisions of the section are broad enough to carry out the legislative intent and prevent the right of a recovery. They apply to actions against a collector as well as those against the United States.

The legislation is not unconstitutional. It does not purport to defeat the right of recovery of taxes not properly owing but merely prevents recovery of amounts properly due except for the statute of limitations. Since the Government may specify the conditions on which it will be sued, it may modify or change statutes of limitation against itself. In so doing it does not violate the Fifth Amendment. The classification is not unreasonable.

ARGUMENT

Preliminary statement

The tax liability involved herein was for the calendar year 1917 and the petitioners' return was filed March 22, 1918. At that time there was no period of limitation on the collection of the tax. The Revenue Act of 1921, Section 250 (d), *infra*, p. 38, provided a five-year period of limitation for assessment and collection of taxes for the year 1917. Cf. *Boucers* v. *N. Y. & Albany Co.*, 273 U. S. 346. Assessment of the tax was timely, having been made in January, 1920. On November 29, 1924, and December 3, 1924, more than five years after the return was filed, the petitioners paid the amounts assessed under threat of distraint.

These payments were made after the enactment of the Revenue Act of 1924, but since assessment was made before that Act the additional period for collection provided therein did not apply (*Russell v. United States*, 278 U. S. 181), and collection was barred by the statute of limitations. Consequently, at the time petitioners entered suit in December, 1927, the respondent was without a defense, unless Section 1106 (a) of the Revenue Act of 1926 barred recovery, a question which has never been settled by this Court (see *Ellay Co.* v. *Bowers*, 25 F. (2d) 637, certiorari denied, 277 U. S. 606), and which need not be considered, as that section has been repealed as of the date of its enactment. Revenue Act of 1928, Section 612, *infra*, p. 43.

The case was tried in the District Court on December 28, 1928 (R. 15), after the effective date of the Act of 1928. On January 3, 1929, that court entered judgment for the petitioners for the amount paid, with interest. (R. 17.) The Circuit Court of Appeals held that Section 611 of the Revenue Act of 1928 barred recovery by the petitioners and reversed the judgment of the District Court.

The principal question is involved in the following cases now before this Court:

DECIDED IN FAVOR OF THE GOVERNMENT

Magee v. *United States*, No. 65 (C. Cls.).

Oak Worsted Mills v. *United States*, No. 104 (C. Cls.).

Taft Woolen Co. v. *United States*, No. 105 (C. Cls.).

Second National Bank of Saginaw, Trustee, v. *United States,* No. 323 (C. Cls.).

Boston Pressed Metal Co. v. *United States,* No. 337 (C. Cls.).

Reeves, Inc., v. *Anderson,* No. 463 (C. C. A. 2d).

Mascot Oil Co. v. *United States,* No. 490 (C. Cls.).

Roy & Titcomb, Inc., v. *United States,* No. 412 (C. Cls.).

American Glue Co. v. *United States,* No. 519 (D. Mass.).

Jennings v. *Anderson,* No. 529 (C. C. A. 2d).

DECIDED AGAINST THE GOVERNMENT

United States v. *Wyman, Partridge & Co.,* No. 416 [1] (C. Cls.).

Heiner v. *Erie Coal & Coke Co.,* No. 508 (C. C. A. 3d).

In addition to the above, the following cases involving the application of the section have been decided:

DECIDED IN FAVOR OF THE GOVERNMENT

Gotham Can Co. v. *United States,* 68 C. Cls. 749, 37 F. (2d) 793; petition for certiorari dismissed, 281 U. S. 706.

Huntley v. *Gile,* 32 F. (2d) 857 (C. C. A. 9th).

Wright & Taylor v. *Lucas,* 34 F. (2d) 328 (W. D. Ky.), aff'd, Nov. 10, 1930 (C. C. A. 6th).

[1] The court held with the Government on this question but decided against it on another ground.

L. H. Woodward Co. v. *Anderson*, 34 F. (2d) 709 (D. Utah.).

Regla Coal Co. v. *Bowers*, 37 F. (2d) 373 (S. D. N. Y.).

Rockland & Rockport Lime Corporation v. *Ham*, 38 F. (2d) 239 (D. Maine).

North American Creamery Co. v. *Willcuts*, 38 F. (2d) 483 (D. Minn.).

Pigott v. *Poe*, 41 F. (2d) 273 (W. D. Wash.)

Sterling Wholesale Grocery Co. v. *United States*, decided Oct. 16, 1930 (N. D. Ill.).

Wolf Safety Lamp Co. v. *United States*, decided Oct. 14, 1930 (S. D. N. Y.); Prentice-Hall Federal Tax Service, 1930, Vol. 2, par. 1839.

Parker v. *Routzahn*, decided Oct. 28, 1930 (N. D. Ohio); Prentice-Hall Federal Tax Service, 1930, Vol. 2, par. 1966.

DECIDED AGAINST THE GOVERNMENT

United States v. *Burden, Smith & Co.* 33 F. (2d) 229 (C. C. A. 5th).

Clinton Iron & Steel Co. v. *Heiner*, 30 F. (2d) 542 (W. D. Pa.).

Cutcheon v. *Rafferty*, 34 F. (2d) 708 (E. D. N. Y.).

Pepsin Syrup Co. v. *Schwaner*, 35 F. (2d) 197 (S. D. Ill.).

Sugarland Industries v. *Bass*, 36 F. (2d) 375 (W. D. Tex.).

Neuland v. *Bowers*, 38 F. (2d) 842 (S. D. N. Y.).

Diamond Alkali Co. v. *Heiner*, 39 F. (2d) 643 (W. D. Pa.).

Bessemer Coal & Coke Co. v. *Heiner*, 39 F. (2d) 492 (W. D. Pa.).

Southern Lumber Co. v. *United States* (W. D. Ark.) not yet reported, but will be found in Prentice-Hall Federal Tax Service, 1930, Vol. 1, par. 1386.

Illinois Kaolin Co. v. *United States*, unreported (N. D. Ill.).

National Carton Co. v. *Reinecke*, unreported (N. D. Ill.).

I

SECTION 611 OF THE REVENUE ACT OF 1928 BARS RECOVERY BY THE PETITIONERS UNDER THE FACTS OF THIS CASE

Section 607 of the Revenue Act of 1928 provides that any tax "assessed or paid * * * after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim." Section 611 provides that if any tax "was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

In the instant case the sum sought to be recovered was assessed in January, 1920, within five

years of the return date and prior to June 2, 1924. A claim in abatement was filed without bond and collection was delayed until November and December, 1924. It is submitted that the facts bring the case squarely within Section 611 and that an examination of the legislative history of the section and the reasons underlying its enactment demonstrates that it was intended to bar recovery of amounts paid under circumstances such as those presented herein.

A. THE HISTORY OF SECTION 611 AND THE REASONS FOR ITS ENACTMENT SHOW THAT IT WAS THE LEGISLATIVE INTENT TO BAR RECOVERY OF AMOUNTS COLLECTED AFTER THE STATUTE OF LIMITATIONS HAD RUN, WHERE A CLAIM IN ABATEMENT WAS FILED AND COLLECTION STAYED

Section 250 (d) of the Revenue Act of 1921 required assessment of taxes for prior years to be made within five years after the return was filed and prohibited any suit or proceeding after that period for the collection of the tax. The Treasury Department held that taxes assessed within the five-year period could be collected by distraint at any time and that a suit in court was the only proceeding for collection that was barred after the five-year period. I. T. 1446, Cumulative Bulletin I–2 (July-Dec., 1922), p. 218. This being the position of the Treasury Department, the practice of delaying collection upon the filing of claims for abatement developed. Upon the filing of a claim for abatement the collection of any additional tax was deferred until the taxpayer could

have a hearing and an opportunity to present facts in opposition to the assessment. In a great many cases this practice delayed the collection until after the five-year period had expired. On February 21, 1927, this Court rendered its decision in *Bowers* v. *N. Y. & Albany Co., supra,* holding that collection by distraint was a "proceeding" within the meaning of Section 250 (d) of the Revenue Act of 1921 and that such collection was barred thereby after five years. This case finally established that the view of the Treasury Department was erroneous and that a great many of the collections theretofore made had been barred.

Before this decision and before enactment of the Revenue Act of 1926, the Court of Claims rendered a decision in *Toxaway Mills* v. *United States,* 61 C. Cls. 363, which caused confusion and uncertainty as to the effect of the statute of limitations. In that case the court held *inter alia* that if the tax had been collected after the statutory period the taxpayer must nevertheless prove that there had been an overpayment on the merits, disregarding the limitations, on the theory that the statute of limitations did not extinguish the liability but merely barred the remedy. The case was later reversed on confession of error. *Toxaway Mills* v. *United States,* 273 U. S. 781. Before its reversal, the decision of the Court of Claims was brought to the attention of the Committee in Congress then engaged in drafting the Revenue Bill of 1926, and Section 1106 (a) of the Revenue Act of 1926 was

enacted for the purpose of clarifying the situation. The Conference Report, House Report No. 356, 69th Congress, 1st Session, explains the amendment as follows (p. 55):

> Amendment No. 170: This amendment provides that the bar of the statute of limitations against the United States and against the taxpayer shall operate to bar the remedy and also extinguish the liability. This amendment is deemed advisable because of an opinion in a recent decision of the Court of Claims (*Toxaway Mills* v. *United States*), although in a case presenting the specific point this opinion very probably would not be followed by the Supreme Court (See, Taft, C. J., in *Graham* v. *du Pont*, 262 U. S. 234, 256, 258). The House recedes with an amendment making certain that the provision does not require a refund to a taxpayer for any year (even though the statute has run against the Government) unless he had in fact overpaid his tax for that year, nor require a taxpayer to pay an additional tax for any year (even though the statute has run against his claim or suit for refund) unless he had in fact underpaid his tax for that year. Obviously, this section does not apply in the case of fraud or in the case of a waiver.

But the provisions of Section 1106 (a) failed to resolve the doubts concerning the effect of the running of the statute. Cf. Senate Report No. 960, 70th Congress, 1st Session, p. 41, Appendix B, *infra*,

p. 46. While it provided that the bar of the statute against the United States and against the taxpayer should not only operate to bar the remedy but should extinguish the liability, it also provided that no credit or refund should be allowed unless the taxpayer had overpaid the tax. The same uncertainty existed as to a taxpayer's right to recover taxes paid out of time.

The situation was clarified by the Revenue Act of 1928. By Section 612 of that Act, Section 1106 (a) of the Revenue Act of 1926 was repealed as of the date of its enactment and Sections 607, 608, and 609 were substituted for the purpose of settling at rest the right of recovery where taxes were collected after the period of limitation had run. At the same time Section 611 of the Revenue Act of 1928 was enacted for the express purpose of retaining in the Treasury amounts collected after the period of limitation when collection was delayed by reason of the consideration of a claim in abatement.

The purpose of the enactment of the above sections of the Revenue Act of 1928 is made clear by an examination of the Committee Reports in connection with the Bill. These reports will be found in Appendix B, *infra*, pp. 45-51. With respect to Section 607 they show (*infra*, p. 46) that that section and its companion Sections 608, 609, and 610 were enacted "to resolve many doubtful questions as to the legal effect which follows the expiration of the period of limitations prescribed for the as-

assessment or collection of a tax or for the making of a refund or credit or the bringing of a suit for refund." The following language from the Report of the Committee on Ways and Means (*infra*, p. 48) shows the reasons for and purposes of Section 611:

> * * * taxpayers were frequently permitted to file claims in abatement with the collector and thus delay the collection until the claim in abatement could be acted upon. * * * It was supposed that there was no limitation upon the collection by distraint of the amount ultimately determined to be due. * * * Amounts have been paid, are being paid, by the taxpayer even though the statute of limitations may have run. Exceptionally large amounts are involved. Accordingly, it is of utmost importance to provide that the payments already made should not be refunded. * * *

The Senate refused to agree to that portion of the House Bill which permitted collection within a year after the enactment of the new Act of amounts not yet paid, but the prohibition upon refunds of amounts already paid was retained.

Section 611 did not refer, as contended by the petitioners, only to those cases where a refund claim was filed after the enactment of the Act. It contains no language which can be said to accomplish such a result. The phrase "is filed" contained in Section 607 refers to the statute and not to the time of action, and there is no apparent reason for confining the operation of that section to

those taxpayers who filed claims for refund after the passage of the Act. But, irrespective of the interpretation placed on the phrase in Section 607, the provisions of Section 611 clearly refer to past action with respect to what should be considered an overpayment. There is no reference in Section 611 to claims for refund or to the time for filing them. Likewise there is nothing in the language of the section which restricts its application to those cases in which voluntary payments were made and renders it inapplicable to payments made under threat of distraint.

It seems apparent, therefore, that Section 611 of the Revenue Act of 1928 was intended to prevent the recovery of amounts collected where a claim in abatement was filed and collection stayed until after the statute had run. Therefore the only further inquiry is whether the collection here was "stayed" within the meaning of the Act.

II. THE WORD "STAYED" AS USED IN SECTION 611 CONTEMPLATES ADMINISTRATIVE DELAY AS A RESULT OF A CLAIM IN ABATEMENT AND NOT A TECHNICAL LEGAL STAY.

Petitioner contends that the word "stayed" as used in the statute contemplates a mandatory or judicial stay as a result of which the Commissioner was forbidden to collect, and that it has not been shown in the instant case that collection was thus stayed within the meaning of the statute. We submit that so to hold would be contrary to the legislative intent and would deprive Section 611 of any substantial effect.

The legislative history leaves no doubt of the intention of Congress in its use of the word. The Ways and Means Committee Report, *infra*, p. 48, states, in part (p. 34):

> Prior to the enactment of the Revenue Act of 1924 it was the administrative practice to assess immediately additional taxes determined to be due. Upon the assessment, taxpayers were frequently permitted to file claims in abatement with the collector and *thus delay the collection* until the claim in abatement could be acted upon. If this practice had not been followed, undue hardship undoubtedly would have been imposed upon the taxpayer. (Italics ours.)

The Report of the Finance Committee of the Senate, *infra*, p. 49, states, in part (p. 42):

> Section 611 of the House bill proposes to extend the statute of limitations, particularly in cases for 1917 and prior years, if no assessment had been made but the *collection delayed* by the filing of a claim in abatement, * * *. (Italics ours.)

In the Conference Committee Report, *infra*, p. 50), reference is made to "proceedings for the collection of the tax * * * not promptly instituted (as would have been the case had the claim in abatement not been filed) * * *." From these statements it appears that the word "stayed," as used in the statute, does not contemplate a judicial or statutory stay of proceedings, but merely refers to the

Collector's deferring the collection as a result of the claim in abatement.

Moreover, as to taxes assessed prior to June 2, 1924, in respect of which no appeal has been taken to the Board of Tax Appeals, the only provision for a mandatory stay which we have found is contained in Section 284 (a) (14) of the Revenue Act of 1918. This provision has a very limited application, refers only to the taxes for the year 1918, and requires the giving of bonds. If a bond is given, the collection is not restricted by the statute of limitations but only by the provisions of the bond itself. *United States* v. *John Barth Co.*, 279 U. S. 370. Section 611 refers to a claim in abatement with or without bond. There is no mandatory stay without bond. Therefore, it is apparent that to limit its application to a mandatory stay with bond would be to disregard the provisions of the statute and to limit the application of the section to the few cases in which the statute of limitations is not effective since collection could always be made upon the bond irrespective of the statute. As was said by the Circuit Court of Appeals for the Second Circuit in *Reeves, Inc.*, v. *Anderson*, *supra*, not yet reported but to be found in Prentice Hall, Federal Tax Service, Vol. I, 1930, paragraph 1983:

> . . . if we construe "stayed" to mean a legal bar, we should give the section no scope whatever. Patently it must refer to those cases in which the collector did not

proceed with enforcement while the Commissioner was engaged in passing upon the claim for abatement; such a stay has in practice been recognized as ancillary to the Commissioner's power to remit.

The reasons for this conclusion may be found in the following statement by the District Court in *Reeves, Inc.*, v. *Anderson*, reported as *Regla Coal Co.* v. *Bowers*, 37 F. (2d) 373, 375–376):

> The 1918 act, however, required that a claim for abatement be accompanied by a bond; Section 611 of the Act of 1928, by its express terms, is applicable, irrespective of whether or not a bond accompanied the claim. Moreover, while the Act of 1918 was the only statute prior to 1924 which made provision for a claim and formal stay, the Commissioner of Internal Revenue has had authority to abate or refund taxes illegally assessed throughout the period under review. See 26 USCA, Sec. 149, historical note. And pursuant to statutory authority, the Commissioner, with the approval of the Secretary of the Treasury, promulgated regulations which included provisions for the filing of claims in abatement. In none of them, however, was the execution of a bond required, or was there a mandatory provision that collection must be stayed pending decision on the claim in abatement. On the contrary, it was provided that the filing of a claim in abatement did not necessarily operate as a suspension of the collection of the tax or make it any less the duty of the collector to exercise due

diligence to prevent the collection of the tax being jeopardized by the running of the statute or otherwise. See article 261, regulation 33; article 1032, regulation 46; article 1032, regulation 62; cf. *United States* v. *Burden, Smith & Co.* (C. C. A.) 33 F. (2d) 229, 230. Under these regulations, the collector had authority to postpone the collection of the tax pending the determination of the claim for abatement, unless, in his judgment, such action would jeopardize the ultimate collection of the tax. Postponement was the common practice where there was no doubt as to the solvency of the taxpayer; in many cases the period of the statutory bar on collection expired before the decision on the claim in abatement had been rendered. See H. R. Rep. No. 2, 70th Cong., 1st Sess., page 34; H. R. Doc. No. 578, 69th Cong., 2d Sess., page 3, et seq. This was because prior to *Bowers* v. *New York & Albany Lighterage Co.*, 273 U. S. 346, 47 S. Ct. 389, 71 L. Ed. 676, the Bureau believed that the limitation provisions did not apply to distraints, and that therefore the collection was not in fact jeopardized.

Following the decision in the *Albany Lighterage Case*, a large number of taxpayers in the situation of the present plaintiffs, who had failed to have their assessments abated and who had been forced to pay under threat of distraint, sought to secure refunds on the ground that the taxes had been illegally collected. It was to meet this situation that the present sec-

tion 611 (26 U S C A Sec. 2611) was drafted * * *.

The foregoing argument also disposes of any contention that it must affirmatively appear that the filing of a claim in abatement resulted in a stay. As no statute stayed collection upon the filing of a claim in abatement and such filing did not under the regulations necessarily delay the collection, Congress refrained from placing a condition in this section that upon filing of a claim in abatement collection must have been stayed by statutory or judicial mandate. Congress knew the situation and legislated with reference to that situation. As the Circuit Court of Appeals said in *Reeves, Inc.*, v. *Anderson, supra:*

> * * * to suppose that the collector * * * withheld action for any other reason than because his collection might turn out to be unwarranted, is to assume that he was slack in his duty; we are entitled to assume the opposite. Article 1032 of Regulations 45 puts collection in his discretion in such circumstances; his inaction would have been without excuse except for the claim. Regardless of the evantual burden of proof on the issue, the presumption is that the delay was caused by the claim; * * *.

The collection was delayed in these cases to permit an appeal to the Commissioner and the claim in abatement was the medium through which the appeal was to be effected. It made possible an appeal in cases where appeal was not afforded prior to

assessment. (See Section 250 of the Revenue Act of 1921 and Article 1032, Regulations 62.)

Nor is there any merit in the contention that the pendency of the claim in abatement must have continued to delay the collection until after the statutory period for collection had expired. The section does not so require. It in terms applies to every tax paid prior to May 29, 1929 (one year after the enactment of Section 611), in which a claim in abatement was filed and collection stayed. The taxpayer here chose to avail himself of the privilege of claiming abatement in preference to paying the tax and seeking refundment, and the action of the collector in deferring collection fixed the status of the tax and of proceedings relating to it for the purposes of this section. It thereby became a tax the collection of which was "stayed," and the section applies without limitation to every tax within that class. Cf. *Parker v. Routzahn, Collector*, decided October 28, 1930 (N. D. Ohio), not yet reported, to be found in Prentice-Hall Federal Tax Service, 1930, vol. 2, par. 1966; *Wolf Safety Lamp Co. v. United States*, decided Oct. 14, 1930 (S. D. N. Y.), not yet reported, to be found in Prentice-Hall Federal Tax Service, 1930, vol. 2, par. 1969.

II

SECTION 611 OF THE REVENUE ACT OF 1928 DOES NOT [illegible] PROVIDE A RULE FOR ADMINISTRATIVE GUIDANCE BUT EFFECTIVELY BARS THE RIGHT OF RECOVERY BY SUIT

The contention is made that section 611 merely established a rule for administrative guidance of

the Commissioner and has no effect on the right of the taxpayer to recovery in court. The contention is based upon the view that Section 611 is merely a limitation on Section 607; that the latter section was enacted merely for the Commissioner's guidance and that the words "overpayment," "credit," and "refund" wherever used have always referred to administrative action alone.

It has been argued under Point I of this brief that it was the legislative intent to bar recovery of amounts paid which were properly due, except for statutory limitations, when a claim in abatement was filed and collection delayed. Certainly Section 611 as originally proposed by the House contemplated more than a rule for administrative guidance, since it not only prohibited refunds but also allowed collection after the enactment of the Act. The elimination of the collection portion and the retention of the prohibition against refunds of amounts already collected did not change the underlying purpose sought to prevent repayment of amounts properly owing but collected after the statute had run. The legislation entirely fails in its purpose if the petitioners' construction is adopted and the taxpayer may recover the amounts by suit. Moreover, there would be no purpose in referring to an administrative officer a claim which he could not grant, but which the taxpayer could recover by suit in court. As the Court of Claims said in *Oak Worsted Mills* v. *United States*, supra,

36 F. (2d) 529, 533, now pending in this Court (No. 104, October Term, 1930):

> It will be observed in this connection that the decisions cited by plaintiff assert that these sections are merely directions to the Commissioner, collector, or other officials of the Government, and nothing more, and therefore, notwithstanding their provisions, suit may be brought and maintained to recover the tax. The doctrine laid down by these decisions as to cases which come under the exceptions of section 611 would create a situation that is very peculiar to say the least. If, for example, a demand is made upon a collector for repayment, he must say that he is forbidden by law to make it, but, if suit is begun against him for the same thing for which demand was made, it can be maintained, and judgment can be entered against him. That Congress intended anything so inconsistent and useless we think no one will contend. When the language of the two sections is considered, we think it will be seen there is nothing in them which requires such a construction.

That the words "overpayment" and "refund" may refer to something more than an administrative act of the Commissioner is shown by other provisions of law. The Board of Tax Appeals is authorized to find an overpayment, thereby disposing of the substantive right. Cf. Revenue Act of 1928, Section 507; Revenue Act of 1926, Sections 284 (e), 319 (c). A "suit for refund" is recognized. Revenue Act of 1926, Sections 284 (d) (3)

319 (z) (3). Section 611 states that payments made under the circumstances set forth therein shall not be considered overpayments under the provisions of Section 607. The heading of Section 607 shows a purpose to define the actual "effect of expiration of period of limitation against United States" and not merely to guide the Commissioner in the performance of his administrative duties.

That the language used in reality goes to the substantive right is further shown by reference to the law as it exists with respect to the recovery of taxes paid. The Government may prescribe the conditions on which suit may be brought to recover taxes, and unless such conditions are met recovery will not be allowed. *Cheatham* v. *United States*, 92 U. S. 85; *Savings Institution* v. *Blair*, 116 U. S. 200; *Dodge* v. *Osborn*, 240 U. S. 118. As a prerequisite to a suit for the recovery of taxes wrongfully exacted, a claim for refund must be presented to the Commissioner. Revised Statutes, Section 3226. The right to sue follows his refusal to make the refund to which the taxpayer is entitled, or upon his failure to act. This system of corrective justice, as it was called in *Snyder* v. *Marks*, 109 U. S. 189, 194, could not have contemplated a demand on the Commissioner as an idle thing and without meaning. It must have intended that his power to remit was at least as broad as the right of the taxpayer to recover and that the taxpayer was entitled to refund by the Commissioner in all cases where there was a right of recovery. In

Savings Institution v. *Blair, supra,* the Court said (p. 205):

> In our opinion no suit can be maintained for taxes illegally collected unless a claim therefor has been made within the time prescribed by the law. When the law says the claim must be presented within two years, the implication is that, unless so presented, the right to demand the repayment of the tax is lost, and the Commissioner has no authority to refund it, and, of course, the right of suit is gone. We regard the presentation of the claims to the Commissioner of Internal Revenue for the refunding of a tax alleged to have been illegally exacted as a condition on which alone the government consents to litigate the lawfulness of the original tax. It is clearly not the intent of the statute to allow the collector to be sued unless the taxpayer has first applied for relief to the Commissioner within the time and in the manner pointed out by law and relief has been denied him. *Cheatham* v. *United States,* 92 U. S. 85; *Railroad Co.* v. *United States,* 101 U. S. 543; *Arnson* v. *Murphy,* 115 U. S. 579.

Conversely, we submit that if there are cases in which the Commissioner is not authorized to repay or refund, no right to sue the United States or the Collector exists. Cf. *Girard Trust Co.* v. *United States,* 270 U. S. 163, in which this Court said (p. 174):

> We think that if Congress intended him to recover interest for his accommodation of the Government by a premature payment of

his taxes illegally collected, it would have made a specific provision for it and have given the Commissioner special authority.

Viewed in this light, we submit that the definition of a payment out of time as an overpayment and the direction to refund or credit contained in Section 607 refers to and makes certain the substantive right which had been uncertain under Section 1106 (a) of the Revenue Act of 1926. The situation is even clearer with respect to Section 611. It is not complicated by the presence of the words "credit" or "refund" and refers to Section 607 only because that section concerned the effect of the statute of limitations, also involved in the application of Section 611. Moreover, the reasons underlying the enactment of Section 611 were wholly different from those underlying Section 607, and if it is to be held that the substantive right is not affected by Section 611 then the legislative intent in the enactment is wholly frustrated.

Nor can it reasonably be contended that even if the above is true with respect to suits against the United States, the same reasoning can not apply to suits against a collector. We contend under Point III herein that the common-law right to sue a collector *in assumpsit* was taken away by statutes which prevented him from withholding for his own protection amounts paid by taxpayers and that a statutory right arose by necessary implication from Sections 3220 and 3226 of the Revised Statutes.

By Section 3220 the Commissioner was authorized to remit, refund, and pay back taxes illegally or erroneously assessed or collected and all damages and costs recovered against any collector by reason of anything done in the due performance of his official duty. Section 619 of the Revenue Act of 1928 amended Section 3220 of the Revised Statutes, as amended, by inserting the words "except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes." This would seem to make Section 611 a clear limitation on the right of the Commissioner to refund taxes and to bar suit against the collector as well as against the United States. The later change in Section 3220 by the Act of May 29, 1928, c. 901, 45 Stat. 986, 996 (U. S. C. Sup. III, Title 26, Section 149), does not modify the effect of Section 619 so far as construing the purpose of Section 611 is concerned. The general effect of this later amendment of Section 3220 is discussed in the Government's brief in *Magee* v. *United States*, No. 65, present term.

Moreover, we submit that, regardless of the credit or refund clause of Section 607, the word "overpayment" in Section 611 is broad enough to strike the foundation from under any recovery by action, by credit, or by refund. It dealt with the merits of the recovery as well as the remedies available. It is interesting to note that the Circuit

Court of Appeals for the Second Circuit, which was of the opinion that the credit or refund clause of Section 1106 (a) of the Revenue Act of 1926 did not prevent an action in court (*Ellay Co.* v. *Bowers, supra*), held that under Section 611 the word "overpayment" as used covered the substantive right. *Reeves, Inc.,* v. *Anderson, supra.*

III

SECTION 611 IS NOT UNCONSTITUTIONAL IF CONSTRUED TO PREVENT RECOVERY HEREIN

Petitioners argue that in any event Section 611, if given the effect contended for by the respondent, is unconstitutional as an attempt to take property without due process of law. This argument is based on the fact that the liability of the taxpayer for the additional taxes of 1917 had been extinguished before suit was brought and that Section 611, if construed to prevent recovery, deprived the petitioners of a vested right not to pay the taxes which had been extinguished.

At the time the taxes herein were collected, the statute of limitations against collection had run. This fact did not operate to extinguish the liability but merely affected the remedy. Cf. *Campbell* v. *Holt*, 115 U. S. 620, 624-628; *Campbell* v. *Haverhill*, 155 U. S. 610, 618. Nor did Section 1106 (a) of the Revenue Act of 1926, *infra*, p. 40, extinguish the petitioners' liability. Payment was made in November and December, 1924, before the enactment of that Act and the liability for the amount was ex-

tinguished by such payment. Clearly Section 1106 (a) was not retroactive in its scope and could not affect taxes paid before its enactment.

But even if the liability had been extinguished, Section 611 is not unconstitutional. In *United States* v. *Wyman, Partridge & Co.* which is now before the Court on certiorari (No. 416) and which is to be argued as one of the group of cases involving the effect of Section 611, it is contended for the Government that the section is not unconstitutional if construed to prevent recovery of taxes collected out of time and after the Revenue Act of 1926 was enacted. We do not consider that the question is involved under the facts of this case, but reference is made to the Government's argument in the *Wyman, Partridge & Co. case* if the Court believes that the point is material here.

If the liability for the tax here was not extinguished otherwise than by payment at the time suit for refund was brought, it is submitted that Section 611 is clearly constitutional if construed to prevent recovery. It is nothing more than a limitation on the granted privilege to sue for refund of taxes paid into the Treasury. If the amounts were greater than those legally due, it does not prevent their recovery. It merely operates in cases coming within its classification to deprive the taxpayer of the right to recover amounts legally due but paid out of time. At the time of collection the liability existed but the right of collection was barred. The

statute of limitations may be extended in order to restore the right of a creditor to sue a debtor even though the bar of the statute had become complete before such suit was instituted. Cf. *Campbell* v. *Holt*, *supra*. That anyone can sue the sovereign at all is by the grace of Congress. That Congress can place any restriction on that right is a necessary corollary. Purely formal conditions can be imposed upon the exercise of that right. *Rock Island &c. R. R.* v. *United States*, 254 U. S. 141, 143. The right can be completely withdrawn before suit (*The Collector* v. *Hubbard*, 12 Wall. 1), or after suit (*United States* v. *Heinszen & Co.*, 206 U. S. 370), and even after judgment Congress can deprive the judgment of any effect (*Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226). It must, therefore, be apparent that, since the Government may prescribe the circumstances under which it consents to be sued, it may also change, modify, or extend a statute of limitation against itself. No vested right is thereby impaired since no such right accrues to the taxpayer out of the running of the period of limitation for the collection of a valid tax. *Campbell* v. *Holt*, *supra*; *The Collector* v. *Hubbard*, 12 Wall. 1. As this Court said in the case last cited (p. 14):

> Remedies of this kind, given by Congress, may be changed or modified, or they may be withdrawn altogether at the pleasure of the law-maker, as the taxpayer cannot have any

vested right in the remedy granted by Congress for the correction of an error in taxation.

The legislative enactment considered in *United States* v. *Heinszen & Co.*, 206 U. S. 370, *supra*, went much farther than does the Act here involved. There suit was brought in the Court of Claims on July 1, 1902, to recover duties exacted in the Philippine Islands by the military authorities on goods imported between April 11, 1899, and November 15, 1901. The exactions were illegal, having been made under order of the President but before the time Congress, by the Act of March 8, 1902, enacted tariff duties for the Philippine Islands. While the case was pending in the Court of Claims, Congress by the Act of June 30, 1906, ratified the exactions. The Court of Claims refused to give effect to the ratifying Act and gave judgment for the plaintiff. It was argued in this Court that Congress could not by retroactive laws impair vested rights without violating the principle that no man shall be deprived of his property without due process of law, and that to give effect to the ratifying Act of 1906 in a case where suit was brought prior thereto would violate the Fifth Amendment. This Court disposed of the argument in the following language (p. 386):

> But if it be conceded that the claim to a return of the moneys paid in discharge of the exacted duties was in a sense a vested right, it in principle, as we have already ob-

served, would be but the character of right referred to by Kent in his Commentaries, where, in treating of the validity of statutes retroactively operating on certain classes of rights, it is said (Vol. 2, pp. 415, 416):

"The legal rights affected in those cases by the statutes were deemed to have been vested subject to the equity existing against them, and which the statutes recognized and enforced. * * *"

Nor does the mere fact that at the time the ratifying statute was enacted this action was pending for the recovery of the sums paid cause the statute to be repugnant to the Constitution. The mere commencement of the suit did not change the nature of the right. Hence again if it be conceded that the capacity to prosecute the pending suit to judgment was in a sense a vested right, certainly also the power of the United States to ratify was, to say the least, a right of as high a character. To arrogate to themselves the authority to divest the right of the United States to ratify is then in reason the assumption upon which the asserted right of the claimants to recover must rest.

Considering how far the bringing of actions would operate to deprive government of the power to enact curative statutes which, if the actions had not been brought, would have been unquestionably valid, Cooley, in his Constitutional Limitations, says (7th ed., p. 543):

"Nor is it important, in any of the cases to which we have referred, that the legisla-

tive act, which cures the irregularity, defect or want of original authority, was passed after suit brought, in which such irregularity or defect became matter of importance. The bringing of suits vests in a party no right to a particular decision; * * *."

Nor does the fact that the instant case involves a suit against a collector of internal revenue rather than against the United States lead to a different conclusion. Actions against a collector are personal in the sense that they may not be prosecuted against his successor in office and judgments therein are not *res judicata* in suits against the United States. *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1; *Sage* v. *United States*, 250 U. S. 33. But such suits are now statutory and are no longer founded on a common law liability. The common law suit *in assumpsit* against a collector was based on the theory that he was an agent of the Government who was permitted to withhold for his own protection sums collected when he had been notified that the taxpayer claimed the right to recover such sums on the ground that they were illegally exacted. *Cary* v. *Curtis*, 3 How. 235; *Arnson* v. *Murphy*, 109 U. S. 238. When the right to withhold was taken away by statutes requiring him to pay sums collected into the Treasury without regard for claims erroneously and illegally exacted, all right to proceed against the collector was lost. *Cary* v. *Curtis*, *supra*; *Curtis's Administratrix* v. *Fiedler*, 2 Black 461, 478. By later enactment

Congress restored the right to sue a collector although the prohibition against withholding sums for his protection was retained. The new right of action was exclusively statutory and could be maintained only because it was authorized by the statute. Cf. *Arnson* v. *Murphy*, 115 U. S. 579; *Schoenfeld* v. *Hendricks*, 152 U. S. 691, 693.

The above cases were concerned with the right to sue collectors of customs. The same principle applies to collectors of internal revenue. Their right to withhold for their protection sums collected has been taken away (Revised Statutes, Section 3210; Act of March 3, 1865, 13 Stat. 469, 483) and the present right of action against them results from statutory provisions. Cf. *City of Philadelphia* v. *The Collector*, 5 Wall. 720, 732–733; *The Collector* v. *Hubbard, supra; DeBary* v. *Dunne*, 162 Fed. 961 (C. C. Ore.). It seems clear that the present right to sue a collector of internal revenue is a statutory right arising by necessary implication from Sections 3220 and 3226 of the Revised Statutes and that the remedy may be changed or modified at the will of Congress. This Court has affirmed modifications of the right in the following cases:

In *Collector* v. *Hubbard, supra*, it was held that suit would not lie until after appeal to the Commissioner. In *Savings Institution* v. *Blair, supra*, it was held that the claim must be filed within the time specified by the statutes, and, as has been

pointed out heretofore in *Cary* v. *Curtis*, it appeared that it was within the power of Congress absolutely to prohibit a suit to recover duties paid to a collector. The case of *Rafferty* v. *Smith, Bell & Co., supra*, extended the rule previously laid down in *United States* v. *Heinszen & Co., supra*, to suits against collectors of internal revenue and those in which judgment had been secured in a lower court prior to the withdrawal by the United States of its consent to be sued. We submit, therefore, that the remedy against a collector of internal revenue does not differ in any manner with regard to modification from that against the United States which, as previously shown, Congress clearly has the power to modify as has been done by Section 611.

The classification made by Section 611 is reasonable and not arbitrary and capricious and does not offend against the Fifth Amendment. Cf. *Barclay & Co.* v. *Edwards*, 267 U. S. 442. Every statute of limitations involves some discrimination. Taxpayers who secured a delay in the payment of their just shares of the burden of the Government by means of a claim for abatement contributed to the conditions which but for Section 611 would have cost the Government millions of dollars. To limit the application of the section to those cases in which the voluntary act of the taxpayer caused delay is not unreasonable. Nor is it unreasonable to provide that no collections should be made out of time in such cases in the future. The line had to be drawn at some point, and it is submitted that it was proper

to draw that line at payments made prior to May 29, 1929, a year after the effective date of the Revenue Act of 1928.

CONCLUSION

We submit that the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

STATUTES

Revenue Act of 1921, c. 136, 42 Stat. 227, 265:

SEC. 250. (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: * * *

Revenue Act of 1924, c. 234, 43 Stat. 253, 299, 300:

SEC. 277. (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279—

* * * * * *

(2) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period. (U. S. C., Title 26, Sec. 1057.)

* * * * *

SEC. 278. (d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made. (U. S. C., Title 26, Sec. 1061.)

(e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act. (U. S. C., Title 26, Sec. 1062.)

Revenue Act of 1926, c. 27, 44 Stat. 9, 113, 115, 116:

SEC. 1106. (a) The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax. (U. S. C. App., Title 26, Sec. 1249.)

* * * * *

SEC. 1111. Section 3220 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3220. Except as otherwise provided in sections 284 and 319 of the Revenue Act of 1926 the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal-revenue taxes collected by him, with the cost and expenses of suit; also all damages and costs recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official

duty, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section." (U. S. C. App., Title 26, Sec. 149.)

SEC. 1112. Section 3228 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3228. (a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided in sections 284 and 319 of the Revenue Act of 1926, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum.

"(b) Except as provided in section 284 of the Revenue Act of 1926, claims for credit or refund (other than claims in respect of taxes imposed by the Revenue Act of 1916, the Revenue Act of 1917, or the Revenue Act of 1918) which at the time of the enactment of the Revenue Act of 1921 were barred from allowance by the period of limitation then in existence, shall not be allowed." (U. S. C. App., Title 26, Sec. 157.)

SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim

for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

(b) This section shall not affect any proceeding in court instituted prior to the enactment of the Revenue Act of 1924. (U. S. C. App., Title 26, Sec. 156.)

Revenue Act of 1928, c. 852, 45 Stat. 791, 874, 875, 878.

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. (U. S. C. Sup. III, Title 26, Sec. 2607.)

SEC. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT.

If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection. (U. S. C. Sup. III, Title 26, Sec. 2611.)

SEC. 612. REPEAL OF SECTION 1106 (a) OF 1926 ACT

Section 1106 (a) of the Revenue Act of 1926 is repealed as of February 26, 1926. (U. S. C., Sup. III, Title 26, Sec. 2612.)

SEC. 619. MINOR ADMINISTRATIVE AMENDMENTS.

* * * * * *

(b) Section 3220 of the Revised Statutes, as amended by section 1111 of the Revenue Act of 1926, is amended by striking out "Except as otherwise provided in sections 284 and 319 of the Revenue Act of 1926" and inserting in lieu thereof "Except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes."

(c) Section 3228 of the Revised Statutes, as amended by section 1112 of the Revenue Act of 1926, is amended by striking out "except as provided in sections 284 and 319 of the Revenue Act of 1926" and inserting "except as otherwise provided by law in the case of income, war-profits, excess-profits, estate,

and gift taxes." (U. S. C., Sup. III, Title 26, Sec. 2619.)

Act of May 29, 1928, c. 901, 45 Stat. 986, 996 (U. S. C., Sup. III, Title 26, Sec. 149):

SEC. 3. Section 3220, Revised Statutes (title 26, section 149, page 737, United States Code), as amended, is amended to read as follows:

"REFUNDMENTS; TAXES AND PENALTIES.—The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; also to repay to any collector or deputy collector the full amount of such sums of money as may be recovered against him in any court, for any internal-revenue taxes collected by him, with the cost and expense of suit; also all damages and cost recovered against any assessor, assistant assessor, collector, deputy collector, agent, or inspector, in any suit brought against him by reason of anything done in the due performance of his official duty, and shall make report to Congress, by internal-revenue districts and alphabetically arranged of all refunds in excess of $500, at the beginning of each regular session of Congress of all transactions under this section."

NOTE.—It seems unlikely that Section 3 of Chapter 901 of the Act of May 29, 1928, was intended to abrogate the exception contained in Section 619 (b) of the Revenue Act of 1928. See note to U. S. C. Sup. III, Title 26, Sec. 149.

APPENDIX B

COMMITTEE REPORTS CONCERNING SECTIONS 607 AND 611 OF THE REVENUE ACT OF 1928

1. *Section 607:*

House Report No. 2, 70th Congress, 1st Session, Ways and Means Committee Report (p. 33):

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Section 1106 (a) of the 1926 Act failed to resolve many doubtful questions as to the legal effect which follows the expiration of the period of limitations prescribed for the assessment or collection of a tax or for the making of a refund or credit or the bringing of a suit for refund. Section 1106 (a) of the 1926 Act is repealed as of its effective date and is replaced by sections 607, 608, 609, and 610 of this bill.

Section 607 of the bill prescribes the effect to be given to the expiration of a period of limitations against the United States and section 608 relates to the effect of the expiration of limitations periods against the taxpayer.

Section 607 provides that regardless of the correct tax liability any payment shall be an overpayment if made after the period of limitation on assessment (no assessment having been made within such period) or after the expiration of the period of limitation on collection by distraint or court

proceedings (no distraint or court proceeding having been begun within such period). An overpayment under section 607 is to be credited or refunded the same as any other overpayment.

Section 607 is applicable to payments made before or after the enactment of this Act. Any such overpayment shall be credited or refunded, however, only if claim therefor is filed within the proper period of limitation.

Neither section 607 nor section 608 applies to payments pursuant to a final decision of the Board of Tax Appeals or of a court, whether or not the question as to the statute of limitations was raised in the proceeding. The decision is final and under no circumstances could a payment pursuant to it be considered erroneous. Obviously, also, neither section applies to cases which have been closed by a final agreement under section 1106 (b) of the 1926 Act or section 606 of the new Bill.

Senate Report No. 960, 70th Congress, 1st Session, Finance Committee Report (p. 41):

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Section 1106 (a) of the 1926 act failed to resolve many doubtful questions as to the legal effect which follows the expiration of the period of limitation prescribed for the assessment or collection of a tax or for the making of a refund or credit or the bringing of a suit for refund. Section 1106 (a) of the 1926 act is repealed as of its effective date and is replaced by sections 607, 608, 609, and 610 of this bill.

Section 607 of the bill prescribes the effect to be given to the expiration of a period of

limitation against the United States and section 608 relates to the effect of the expiration of a period of limitation against the taxpayer.

Section 607 provides that regardless of the correct tax liability any payment shall be an overpayment if made pursuant to an assessment after the expiration of the period of limitation on assessment (no assessment having been made within such period) or after the expiration of the period of limitation on collection by distraint or court proceedings (no distraint or court proceeding having been begun within such period). It is immaterial whether the payment was voluntary or involuntary, and duress is also of no significance in determining the right to recover an amount paid after the statute has run. An overpayment under section 607 is to be credited or refunded the same as any other overpayment.

Section 607 is applicable to payments made before or after the enactment of this act. Any such overpayment shall be credited or refunded, however, only if claim therefor is filed within the proper period of limitation.

The section has been rewritten by a committee amendment in somewhat simpler language.

Neither section 607 nor section 608 applies to payments pursuant to a final decision of the Board of Tax Appeals or of a court, whether or not the question as to the statute of limitations was raised in the proceeding. The decision is final and under no circumstances could a payment pursuant to it be considered erroneous. Obviously, also, neither section applies to cases which have been closed by a final agreement under sec-

tion 1106 (b) of the 1926 act or section 606 of the new bill.

2. *Section 611:*

House Report No. 2, 70th Congress, 1st Session, Ways and Means Committee Report (p. 34):

SEC. 611. COLLECTIONS IN CASES IN WHICH CLAIMS IN ABATEMENT WERE FILED.

Prior to the enactment of the Revenue Act of 1924 it was the administrative practice to assess immediately additional taxes determined to be due. Upon the assessment, taxpayers were frequently permitted to file claims in abatement with the collector and thus delay the collection until the claim in abatement could be acted upon. If this practice had not been followed, undue hardship undoubtedly would have been imposed upon the taxpayer. It was supposed that there was no limitation upon the collection by distraint of the amount ultimately determined to be due. However, the Supreme Court has recently held in a case in which the period for assessment expired prior to the enactment of the 1924 Act, that the period for collection was limited to five years from the date on which the return was filed. Decisions upon claims in abatement are being made every day. Amounts have been paid, are being paid, by the taxpayer even though the statute of limitations may have run. Exceptionally large amounts are involved. Accordingly, it is of utmost importance to provide that the payments already made should not be refunded. In order to prevent inequality, it is also provided that the amounts not yet paid may be collected within a year after the enactment of the new Act.

Your Committee appreciates the fact that this provision will probably be subjected to severe criticism by some of the taxpayers affected. However, it must be borne in mind that the provision authorizes the retention and collection only of amounts properly due, and merely withdraws the defense of the statute of limitations. If it is determined that the amount paid is in excess of the proper tax liability, computed without regard to the statute of limitations, such excess will constitute an overpayment which may be refunded or credited as in the case of any other overpayment.

Senate Report No. 960, 70th Congress, 1st Session, Finance Committee Report (p. 42):

COLLECTIONS IN CASES IN WHICH CLAIMS IN ABATEMENT WERE FILED

Section 611 of the House bill proposes to extend the statute of limitations, particularly in cases for 1917 and prior years, if an assessment had been made but the collection delayed by the filing of a claim in abatement, and also prohibits the refund of amounts paid after the running of the statute of limitations in such cases. Your committee believes that the bar of the statute should be made effective as to both the Government and the taxpayer and recommends that this section be eliminated.

Report No. 1882, 70th Congress, 1st Session, Conference Report (pp. 6–7, 22):

Amendment numbered 190:

That the House recede from its disagreement to the amendment of the Senate numbered 190, and agree to the same with an amendment, as follows:

In lieu of the matter proposed to be stricken out by the Senate amendment insert the following:

SEC. 611. *Collections stayed by claim in abatement.—If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection.*

And the Senate agree to the same.

* * * * * *

STATEMENT OF THE MANAGERS ON THE PART OF THE HOUSE

Amendment No. 190: The House bill (sec. 611) provided that in cases in which a tax was assessed within the period of limitation upon assessments and thereafter (whether before or after the expiration of such period) a claim in abatement was filed, with or without a bond, and if proceedings for the collection of the tax were not promptly instituted (as would have been the case had the claim in abatement not been filed), then (1) if any part of the amount covered by the claim in abatement was thereafter paid, such amount should not be refunded, solely because of the fact that it was paid after the running of the statute, and (2) in cases where the amount was not paid, it could be collected by distraint or proceedings in court begun within one year after the enact-

ment of the new law. The Senate amendment struck out this section; and the House recedes with an amendment retaining the prohibition upon refunds, as above described, and eliminating the authority for collection.

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